PROVINCIAL COURT OF NOVA SCOTIA
Citation: *R. v. Landry*, 2018 NSPC 8

Date: 2018-03-20
Docket: 8091424, 8120921, 8126987, 8171986, 8171987, 8196786
Registry: Pictou

Between:

Her Majesty the Queen

v.

Elvin Scott Landry

SENTENCING DECISION

Judge:	The Honourable Judge Del W. Atwood
Heard:	2018: 12 February, 20 March in Pictou, Nova Scotia
Charge:	Paras. 145(2)(b), 266(a),334(b)(i)-(ii) *Criminal Code of Canada*
Counsel:	Patrick Young for the Nova Scotia Public Prosecution Service Douglas Lloy Q.C. for Elvin Scott Landry

By the Court:

[1] Elvin Scott Landry has been before the court a number of times over the past couple of decades. What began, post adolescence, as a substance-use disorder leading to an array of liquor violations, grew into a level of addiction-related criminality that resulted in Mr. Landry receiving federal sentences in 1999, 2002, 2006, 2010 and 2014 for charges ranging from assault, threats, theft, break and enter, arson, public mischief, aggravated assault, breach of undertaking, and possession of a controlled substance. Mr. Landry's last sentence, imposed 30 June 2014, was a federal term of two years plus one day for theft, possession of a controlled substance and multiple counts of breach of probation. I was not presented with information on Mr. Landry's ERD—either by counsel or in the presentence report; however, given the provisions of the *Corrections and Conditional Release Act*, S.C. 1992, c. 20, ss. 118-132, I would reckon it likely to have been sometime in the fall of 2015.

[2] Things seemed to go along unremarkably for Mr. Landry after he got out – that is until 23 January 2017, when he stole two bottles of spirits from a liquor store, worth $123.98. Mr. Landry was charged with theft and the prosecution

proceeded by indictment, within the absolute jurisdiction of this court (case 8091424).

[3] On 30 May 2017, Mr. Landry stole merchandise worth $83.12 from a supermarket, resulting in another indictable theft-under charge (case 8120921).

[4] A little while later, on 2 July 2017, Mr. Landry ran out of a store with a shopping cart full of groceries worth $801.25; he was stopped before getting very far. That time, it was a summary-offence theft (case 8126987).

[5] On 18 October 2017, Mr. Landry took off from a retailer with a shopping cart laden with $554.43 worth of clothing. He pushed a loss-prevention officer who tried to apprehend him. All this resulted in indictable counts of assault and theft-under (case nos. 8171986 and 8171987 respectively).

[6] To cap things off, Mr. Landry didn't show up for his sentencing hearing on 10 January 2018 and was charged with a summary fail-to-appear count (case 8196786).

[7] Mr. Landry elected to have his assault charge dealt with in this court, and pleaded guilty to all of the preceding charges.

[8] In its original sentencing submissions, the prosecution sought a 20-month prison sentence, with probation to follow; defence counsel asked the court to consider a lengthy conditional-sentence order.

[9] I adjourned my sentencing decision to today. In the interim, Mr. Landry lost what appeared to have been a good job lead. Counsel now submit jointly that the court impose a two-year-plus-one-day federal sentence.

[10] In determining an appropriate penalty, it is important that the court recognize that sentencing is a highly individualized process. This was stated by the Supreme Court of Canada in *R. v. M. (C.A.)*, [1996] 1 S.C.R. 500 at para. 80; *R. v. Ipeelee* 2012 SCC 13 at para. 38; *R. v. Scott*, 2013 NSCA 28 at para. 7; *R. v. Redden*, 2017 NSSC 172 at para. 28; *R. v. MacBeth*, 2017 NSPC 46 at para. 8. "Only if this is so can the public be satisfied that the offender 'deserved' the punishment he received and feel a confidence in the fairness and rationality of the system": *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486 at 533.

[11] In determining a fit sentence, a sentencing court ought to take into account any relevant aggravating or mitigating circumstances. That is prescribed by paragraph 718.2(a) of the *Code*. The court must consider also objective and subjective factors related to the offender's personal circumstances and the facts

pertaining to the particular case, as directed by the Supreme Court of Canada in *R. v. Pham* 2013 SCC 15 at para. 8.

[12] Assessing a person's moral culpability is an extremely important function in the determination of any sentence. This is because a sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender. That fundamental principle is set out in s. 718.1 of the *Code*. In *Ipeelee* at paragraph 37, the Supreme Court of Canada noted that proportionality is tied closely to the objective of denunciation. Proportionality promotes justice for victims, and proportionality seeks to ensure public confidence in the justice system.

[13] In *R. v. Lacasse* 2015 SCC 64 at para. 12, the Supreme Court of Canada confirmed that proportionality is a primary principle in considering the fitness of a sentence. The severity of a sentence depends upon the seriousness of the consequences of a crime and the moral blameworthiness of the individual offender. A consequential analysis requires the court to consider the harm caused by criminalised illegal conduct. The Court recognized that determining proportionality is a delicate exercise, because both overly lenient and overly harsh sentences imposed upon an offender might have the effect of undermining public confidence in the administration of justice.

[14] In determining an appropriate sentence, this court is required to consider, pursuant to para. 718.2(b) of the *Code*, that a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances. This is the principle of sentencing parity.

[15] The court must apply the principle that an offender not be deprived of liberty if less restrictive sanctions might be appropriate in the circumstances. Furthermore, the court must consider all available sanctions other than imprisonment that are reasonable in the circumstances. That principle is set out in paras. 718.2 (d) and (e) of the *Code*.

[16] In *R. v. Gladue*, [1999] S.C.J. 19 at paras. 31 to 33, and 36, the Supreme Court of Canada stated that the statutory requirement that sentencing courts consider all available sanctions other than imprisonment was more than merely a codification of existing law. Rather the provision was to be seen as a remedy whereby imprisonment was to be a sanction of last resort.

[17] In assessing the seriousness of the offences committed by Mr. Landry, I would note that none—except for the assault—is a violent offence. The assault on the loss-prevention officer was a push—a low level use of force which did not result in physical injury. Although two of the thefts involved quantities of

merchandise that were not insignificant, is see no direct or circumstantial evidence of premeditation or planning. These were, in my view, spur-of-the-moment crimes of desperation motivated by need—and there is plenty of evidence of that in Mr. Landry's life described in the presentence report under pretty much every heading: chaotic upbringing by alcoholic parents, early onset alcohol-and-drug dependency, chronic under-employment and unemployment, all leading to financial destitution. Finally, none of the counts involves a breach of trust.

[18] I would situate these offences at the lower end of the scale of seriousness.

[19] In measuring Mr. Landry's moral culpability, I repeat my finding that I see no evidence of calculation or premeditation.

[20] Without doubt, Mr. Landry is marked with a significant prior record. A prior record may offer a court circumstantial evidence whether a person to be sentenced would be a good candidate for rehabilitation; however, Mr. Landry is not to be punished again for offences committed in the past for which the penalties imposed have been served in full.

[21] I find Mr. Landry's moral culpability falling at the lower end of the spectrum of blameworthiness.

[22] In analysing the principle of sentence parity, I have considered the cases presented to the court by the prosecution. I find authorities out of this province to be the most apposite, if not binding.

[23] *R. v. M. (V.J.)* (1983), 55 N.S.R. (2d) 294 (A.D.): the Court increased a petty-theft sentence imposed on a 17-year-old—who would have been dealt with at the time as an adult—from a $250 fine to nine months in prison. The offender had a minor record for theft.

[24] *R. v. Lomond* (1986), 75 N.S.R. (2d) 94 (A.D.): the Court dismissed the offender's appeal from an 18-month prison term for a theft of jewellery from the home of an acquaintance. The offender had a record for break and enter, forgery and possession of property obtained by crime.

[25] These cases were decided over thirty years ago, prior to the enactment of the conditional-sentencing provisions of the *Code* and the codification of principles of restraint.

[26] None of the offences before the court carries a mandatory minimum penalty.

[27] All of the charges before the court are eligible for the full array of sentencing options under the *Code*, ranging from discharges pursuant to s. 730, suspended sentences under para. 731(1)(a), fines under s. 734, fines with probation

under para. 731(1)(b), prison terms under ss. 718.3 and 787, prison with fines or probation under para. 731(1)(b) and s. 734, and conditional sentences under s. 742.1. None of the offences is conditional-sentence barred.

[28] There is a qualitative difference between little evidence of progress and evidence of a little bit of progress: the former is a faint hope; the latter is cogent evidence of small steps. Small steps are a beginning.

[29] Specifically, Mr. Landry has not given up on trying to curb his use of substances. The presentence report informs me that Mr. Landry has an AA sponsor; he has been sober since the fall of 2017. He is in the methadone program.

[30] Employment provides a level of financial stability; people with jobs are more likely to find housing. Work can promote health through access to employment-related care plans. To be sure, a job will not cure all ills; however, experience informs me that, when persons serving sentences are working, the likelihood of them returning to court is reduced substantially—*and see, e.g.,* M. Denver, G. Siwach & S. Bushway, "A New Look at the Employment and Recidivism Relationship" (2017), 55 Criminology at 174-204.

[31] The court considered very seriously Mr. Landry's application for a conditional sentence, particularly given that he had nailed down a good job lead.

While a paycheque is not to be treated axiomatically as a get-out-of-jail-free card, employment—as an assurance of social stability, rehabilitation and a commitment to crime avoidance—may militate in favour of a community-based sentence.

[32] Regrettably, for reasons that have nothing to do with Mr. Landry's earnest interest in landing a job, the conditional offer of employment which he secured earlier this year has been withdrawn. Ordinarily, I would not have treated that as foreclosing the court's considering a non-custodial sentence for Mr. Landry.

[33] However, the court has now been presented with a joint recommendation for a federal term of incarceration. In *R. v. Anthony-Cook*, 2016 SCC 43 at paras. 5, 32, 55, 67, the Supreme Court of Canada directed sentencing judges that they ought not depart from a joint recommendation unless the proposed outcome would be contrary to the public interest or bring the administration of justice into disrepute. As in that case, joint recommendations will become controversial most often when the recommendation is felt to be too low; I have come across only one sentencing case in which the presiding judge rejected a joint submission for being too steep: *R. v. Tschetter*, 2012 ABPC 167. Still, given that both overly lenient and overly harsh sentences imposed upon an offender might have the effect of undermining public confidence in the administration of justice—*Lacasse* at para.

12—it would seem beyond dispute that a sentencing court might permissibly reject a joint recommendation for being unconscionably high.

[34] As I stated earlier, I considered very seriously Mr. Landry's application for a conditional sentence. Nevertheless, the joint recommendation before the court for a penitentiary term of two years plus a day is reasonable, as it is in accord with the principles of proportionality and sentence parity. Furthermore, it is clear that defence counsel canvassed with Mr. Landry very carefully this joint recommendation.

[35] Mr. Landry is sentenced to $50.00 fines for each count, along with $15.00 victim-surcharge amounts for each count. The due date will be 20 March 2021.

[36] I impose periods of imprisonment as follows:

- Case 8091424: A 6-month term of imprisonment;
- Case 8120921: A 6-month term of imprisonment, to be served consecutively;
- Case 8126987: A 3-month term of imprisonment, to be served consecutively;

- Case 8171987: A sentence of one month and one day in prison, to be served consecutively;

- Case 8171986: A 6-month term of imprisonment, to be served consecutively;

- Case 8196786: A 2-month term of imprisonment, to be served consecutively.

[37] This adds up to a total sentence of imprisonment of two years and a day, as recommended jointly by counsel. No ancillary orders were sought by the prosecution.

JPC